BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LESSIE L. DANIELS	)	
Claimant	)	
	)	
VS.	)	Docket No. 250,380
	)	
SEDGWICK COUNTY	)	
Respondent	)	
Self-Insured	)	

ORDER

Respondent appealed Administrative Law Judge Nelsonna P. Barnes' Award dated April 30, 2002. The Board heard oral argument on October 18, 2002. Gary M. Peterson was appointed Board Member Pro Tem to participate in this proceeding.

APPEARANCES

Terry J. Torline of Wichita, Kansas, appeared for the claimant. E.L. Lee Kinch of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) determined the claimant was essentially and realistically unemployable based on the medical opinions of Drs. C. Reiff Brown and Anthony A.G. Pollock as well as the claimant's testimony. Consequently, the ALJ found claimant sustained her burden of proof that she was permanently and totally disabled. And the ALJ denied an offset for retirement benefits finding respondent failed to accurately calculate the amount of the offset.

The issues raised on review by the respondent are: (1) nature and extent of claimant's disability; and, (2) whether the respondent should be entitled to an offset pursuant to K.S.A. 44-501(h). Respondent argues the medical evidence does not support

a finding claimant is permanently and totally disabled and instead the evidence supports a finding claimant has suffered an approximate 38 percent work disability. And respondent argues it is entitled to an offset of $11.71 a week for retirement benefits claimant began receiving December 1, 2001.

The claimant argues the ALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed by respondent as a food service assistant at the Sedgwick County Juvenile Detention Facility. Her job duties included cooking and serving meals, stocking groceries, placing and removing food from shelves in the freezer, cleaning, washing dishes, as well as mopping.

Claimant described an accident that occurred either the end of February or the first of March in 1999. Claimant slipped and fell onto her knees as she turned to leave the freezer with some frozen juice. Claimant got up, continued working and didn't think she had been hurt. Claimant's job required that she stand and as she continued working the pain in her right knee worsened.

Claimant sought treatment with her personal physician, Dr. Melanie Greenwood. Claimant thought she first saw Dr. Greenwood in June 1999. Claimant didn't advise Dr. Greenwood about the slip and fall incident. Claimant underwent physical therapy and continued to work. Claimant's work continued to cause her pain in her knee and she began to experience pain in her back.

Dr. Greenwood ordered an MRI of claimant's knee. The August 26, 1999, MRI revealed claimant had a torn meniscus. The doctor advised claimant her knee problem was related to her work and that she needed surgery. Claimant's last day worked was September 10, 1999.

After a preliminary hearing, Dr. Anthony G.A. Pollock was designated the authorized treating physician. On February 8, 2000, Dr. Pollock performed an arthroscopic debridement of a torn medial meniscus on claimant's right knee. Claimant was released to return to work on March 8, 2000.

When claimant returned to regular job duties for respondent she experienced pain in her knee as well as her back and she had to take frequent breaks to sit down. Claimant

prepared a written resignation dated May 19, 2000, effective June 2, 2000, which was claimant's last day working full-time. Claimant resigned because standing at work caused her too much pain.

Claimant had a follow-up visit with Dr. Pollock on May 9, 2000. Claimant complained of discomfort, some catching and pain in her knee. The doctor prescribed anti-inflammatory medication. Claimant saw Dr. Pollock on July 19, 2000, with knee complaints and the doctor prescribed a different course of anti-inflammatory medication.

Claimant's supervisor requested that she come back to work part-time because of staffing shortages and claimant agreed. Claimant worked on a sporadic basis and sometimes worked 8 hours but mostly just a few hours a day. Claimant noted that when she worked she experienced pain. The last day claimant worked part-time for respondent was December 2, 2000. Claimant applied for and began receiving her retirement benefits December 1, 2001.

Claimant returned to Dr. Pollock on January 18, 2001, with continued knee complaints as well as lower back pain. The doctor next saw claimant on March 21, 2001, and the doctor concluded that due to her knee injury claimant developed an altered gait which caused her to develop back problems. On May 24, 2001, Dr. Pollock imposed restrictions that claimant should limit her activities to sedentary work with no excessive squatting and climbing.

On June 21, 2001, Dr. Pollock sent a letter to respondent's counsel in which he said:

> I believe she [claimant] could be capable of returning to sedentary work with no excessive squatting and climbing right now and had been at maximum medical improvement certainly on 5-24-01. . . . She is 63 years old. She has significant limitations. Probably, in all reality, she will not be able to return to any gainful employment.

On August 29, 2001, Dr. Pollock sent a letter to claimant's counsel which provided:

> It is my opinion, within a reasonable degree of medical probability, that Ms. Daniels is presently unable to engage in any substantial and gainful employment because of the degenerative arthritis of her knee and early degenerative changes in her lumbar spine. I believe it quite likely that she will eventually require a total knee arthroplasty in the future because of her partial medial meniscectomy.[1]

[1] Pollock Depo., Ex. 1.

Dr. Pollock testified that if claimant could find work within his restrictions, he would not object to her returning to work. The doctor explained his opinion in the following manner:

> I still think that this lady, if a job were offered within limitations, could work. Yes, she's got arthritis of her knee and, yes, she's got some mild tenderness in her back, but she could do some employment if it were available. Whether in fact any such job would be offered to her by an employer is probably unrealistic. That's all I am saying.[2]

The claimant was evaluated by Dr. Reiff Brown on November 16, 2001, at respondent's request for the purpose of providing a diagnosis, restrictions and an impairment rating. Dr. Brown concluded claimant's altered gait stressed her lumbar spine which resulted in chronic low back strain. The doctor opined claimant suffered a 7 percent impairment to her lower extremity which converts to a 3 percent whole body impairment. And claimant suffered a DRE Lumbosacral Category II 5 percent whole body impairment due to aggravation of a degenerative disk by claimant's limping gait. Combining the ratings resulted in an 8 percent permanent partial functional impairment to the whole body.

Dr. Brown imposed restrictions that claimant should permanently avoid work that required frequent long walks, frequent squatting, frequent standing and that, ideally, her work would allow her to alternately sit and stand with occasional walks around the room. Lifting should be limited to 30 pounds occasionally, 15 pounds frequently with all lifting performed using proper body mechanics. Claimant should also avoid frequent bending and rotation of her lumbar spine greater than 30 degrees. The doctor defined frequent as an activity performed two-thirds of the working day. Dr. Brown opined that claimant was not permanently and totally incapable of substantial gainful employment, as long as she found a job that would allow her to stay within his restrictions.

Based upon a task list prepared by Karen Terrill, a vocational consultant, Dr. Brown concluded claimant could no longer perform 3 of 7 tasks. Dr. Brown agreed that if all the tasks were performed continuously while constantly standing then she could not perform any of the tasks.

Ms. Terrill met with claimant at respondent's request in order to prepare a task list regarding claimant's 15-year job history preceding the accident, to determine her wage earning capacity and to assess claimant's employability. Ms. Terrill opined there are jobs in the work market that claimant could perform within Drs. Pollock and Brown's restrictions. Ms. Terrill identified telemarketing jobs which pay approximately $6.90 an hour.

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[2] Pollock Depo. at 24.

The parties stipulated into evidence a memorandum from James Long, an auditor, regarding an appropriate method to calculate a member's contribution to the retirement benefit. The memorandum concluded there were three possible methods and that two were imperfect. It was noted that having the system actuary calculate an actual cost ratio based on a member's account would be costly and time consuming. Consequently, one of the "imperfect" methods was used to calculate claimant's contribution to her retirement benefit. Using the method adopted it was concluded the employer's contribution was $50.98 a month or $11.71 weekly. Because the method used was recognized as being imperfect, the ALJ concluded respondent had not met its burden of proof to establish the amount of retirement offset.

It is undisputed claimant suffered injury to her right knee and because of her altered gait also suffered injury to her lumbosacral spine. But respondent argues claimant has not met her burden of proof to establish that she is permanently and totally disabled.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[3] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[4]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[5]

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other

[3] K.S.A. 44-501(a) (Furse 1993).

[4] K.S.A. 44-508(g) (Furse 1993).

[5] *Tovar v. IBP, Inc.*, 15 Kan. App.2d 782, 817 P.2d 212 (1991).

> causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2) , the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[6]

In *Wardlow*[7], the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

The Board disagrees with the ALJ's conclusion that claimant is permanently and totally disabled. Dr. Pollock felt claimant could perform sedentary work noting she had arthritis of her knee and mild tenderness in her back. Dr. Brown opined claimant was not permanently and totally disabled and was capable of substantial gainful employment as long as she worked within the restrictions he imposed. Karen Terrill, utilizing Drs. Pollock and Brown's permanent work restrictions, testified that there are jobs in the open labor market that claimant could perform. Ms. Terrill further testified, in her opinion, there were jobs in the open labor market claimant could qualify for with her experience and within her current physical restrictions that paid approximately $6.90 an hour.

The Board, therefore, concludes the greater weight of the credible evidence contained in the record established claimant retains the ability to perform substantial and gainful employment. Thus, claimant is not entitled to a permanent and total disability award.

Because claimant's injuries comprise an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 44-510e. That statute provides, in part:

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[6] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[7] *Wardlow v. ANR Freight Systems*, 19 Kan. App.2d 110, 113, 872 P.2d 299 (1993).

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[8] and *Copeland*.[9] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon ability rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[10]

After claimant quit her employment with respondent, she did not attempt to find employment. Consequently, claimant did not make a good faith effort to find appropriate employment and the determination of claimant's post-injury wage must be based upon the evidence regarding her capacity to earn wages. The Board finds persuasive the expert opinion provided by Ms. Terrill that claimant has the capacity to earn $6.90 an hour. This results in a 26 percent wage loss until June 30, 2000. Because claimant's fringe benefits were terminated on that date, her average weekly wage must be recalculated[11] and the

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[8] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[9] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[10] Id. at 320.

[11] See K.S.A. 44-511(a)(2).

percentage of wage loss would correspondingly increase to 35 percent after June 30, 2000.

Ms. Terrill prepared a list of tasks claimant had performed in the 15 years preceding her accident. Dr. Brown initially concluded claimant could no longer perform 3 of 7 tasks on the list. But the 7 tasks, primarily in food preparation, required that claimant stand for her entire work day. Isolating the individual tasks resulted in Dr. Brown's initial opinion but when informed claimant was required to stand the entire work day, Dr. Brown concluded claimant's inability to stand for a full workday eliminated her ability to perform any of the tasks. Consequently, the Board concludes claimant has suffered a 100 percent task loss.

Combining and averaging claimant's wage loss and task loss results in a 63 percent work disability until June 30, 2000 and a 68 percent work disability after that date.

Respondent next argues that it is entitled to a credit for the retirement benefits claimant began receiving December 1, 2001. The Board agrees.

K.S.A. 44-501(h) provides:

> If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

K.S.A. 44-501(h) provides for such an offset when the claimant is receiving retirement benefits where a plan is provided by the employer. Claimant testified that she began drawing her retirement benefits from respondent on December 1, 2001. The respondent provided evidence from an auditor for respondent's retirement plan that discussed the possible methods to calculate the amount that claimant had contributed to the plan. Although there was concern the method utilized was not "perfect," nonetheless, it represented the best method available to the retirement fund and was not so flawed as to be disregarded. The Board finds the employer is entitled to receive a credit pursuant to K.S.A. 44-501(h) for retirement benefits attributable to contributions by the employer.

The employer contribution equates to a weekly benefit of $11.71. Claimant's weekly permanent disability compensation should be reduced by this amount beginning with the week the payment of her retirement benefits commenced on December 1, 2001.

AWARD

WHEREFORE, it is the finding, of the Board that the Award of Administrative Law Judge Nelsonna P. Barnes dated April 30, 2002, should be modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Lessie L. Daniels, and against the self-insured respondent, Sedgwick County for an accidental injury which occurred on September 10, 1999, and based upon an average weekly wage of $371.05 until June 30, 2000, and thereafter an average weekly wage of $421.79.

Claimant is entitled to 25 weeks of temporary total disability compensation at the rate of $247.38 per week[12] or $6,184.50 followed by 8.14 weeks of temporary total disability compensation at the rate of $281.21 per week[13] or $2,289.05 followed by 9 weeks permanent partial disability compensation at the rate of $247.38 per week or $2,226.42 for a 63 percent permanent partial general disability, followed by 74.14 weeks of permanent partial disability compensation at the rate of $281.21 per week or $20,848.91, followed by 186.72 weeks of permanent partial disability compensation at the rate of $269.50 per week[14] or $50,321.04 for a 68 percent permanent partial general disability, making a total award of $81,869.92.

As of June 30, 2003, claimant is entitled to 25 weeks of temporary total disability compensation at the rate of $247.38 per week or $6,184.50 followed by 8.14 weeks of temporary total disability compensation at the rate of $281.21 per week or $2,289.05 followed by 9 weeks permanent partial disability compensation at the rate of $247.38 per week or $2,226.42 followed by 74.14 weeks of permanent partial disability compensation at the rate of $281.21 per week or $20,848.91 followed by 82.29 weeks of permanent partial disability compensation at the rate of $269.50 or $22,177.16 for a total due and owing of $53,726.04, which is ordered paid in one lump sum less any amounts previously

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[12] The claimant's average weekly wage between the September 10, 1999, accident date and June 30, 2000, was $371.05 resulting in a $247.38 temporary total disability compensation rate.

[13] The claimant's average weekly wage commencing on June 30, 2000, was $421.79 for a $281.21 per week temporary total disability compensation rate.

[14] As of December 1, 2001, the claimant's permanent partial disability compensation rate is reduced by $11.71 for the retirement offset.

paid. Thereafter, claimant is entitled to $28,143.88 of permanent partial disability compensation at the rate of $269.50 per week, until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of June 2003.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

I respectfully disagree with the majority and would find that claimant is essentially unemployable. While the doctors opined that claimant was capable of sedentary work, nonetheless, they agreed any job would require claimant to stay within her restrictions and would necessitate allowing claimant to alternate sitting and standing with occasional walks around the room. While there are certain tasks claimant could possibly do, it appears, based upon the testimony of the medical experts, that claimant would be extremely limited in her ability to obtain any type of employment and it would require only the perfect situation to allow her to return to work. As Dr. Pollock noted, whether any such job would be offered to her by an employer is probably unrealistic.

In *Wardlow* [15] there was evidence that it would be difficult for claimant to obtain any type of employment due to his age and physical restrictions. Here, claimant is 65 years old and has physical restrictions that limit her to sedentary work although she has primarily

[15] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

worked only manual labor jobs. Therefore, claimant should be awarded a permanent total disability. I agree with the majority's analysis regarding the retirement offset.

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BOARD MEMBER

c: Terry J. Torline, Attorney for Claimant
E.L. Lee Kinch, Attorney for Respondent
Nelsonna P. Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director